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January 28, 1999

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Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 95-31

Dear Ms. Salas:

Transmitted herewith, on behalf of Jack I. Gartner, is an original and fourteen (14) copies of his Comments in the above-referenced rulemaking proceeding.

Please contact the undersigned in the event the Commission has any questions with respect to these Comments.

Sincerely,



Aaron P. Shainis
Counsel for
JACK I. GARTNER

Enclosure

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JAN 28 1999

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Reexamination of the Comparative) MM Docket No. 95-31
Standards for Noncommercial)
Educational Applicants)

To: Chief, Mass Media Bureau

COMMENTS OF JACK I. GARTNER

Jack I. Gartner ("Gartner") files these Comments in response to the Commission's Further Notice of Proposed Rule Making in MM Docket No. 95-31.¹ Briefly, Gartner endorses the position that in cases where commercial spectrum is being awarded, auctions are prohibited only in those situations where, by definition, the license will be issued to an entity described in Section 397(6) of the Communications Act, 47 U.S.C. § 397(6) (where a reserved frequency is involved). Such a position carries out the intent of the Act and better serves the public interest.

BACKGROUND

Gartner is an applicant for construction permit for a new commercial television station to operate at Davenport, Iowa on Channel 30. Gartner is the only commercial applicant which has applied for the Davenport channel. Two other noncommercial educational entities, however, have filed applications for the Davenport channel as well. While Gartner filed his application on October 1, 1996, he is prohibited from providing service to the Davenport market because of the two other mutually exclusive applications and the instant rule making proceeding.

¹ Reexamination of the Comparative Standards for Noncommercial Educational Applicants, 13 FCC Rcd. 21167 (1998).

ARGUMENT

The Commission reserves specific channels for the exclusive use of noncommercial educational stations. See 47 C.F.R. §§ 73.501 (radio) and 73.606 (television). Commercial applicants, like Gartner, are legally forbidden to apply for such channels. However, at present, the contrary does not hold true. The Commission has traditionally permitted noncommercial educational entities to apply for spectrum not specifically reserved for noncommercial use. All applicants competing for commercial broadcast spectrum, including any noncommercial educational applicants seeking such channels, have been required to compete under the rules and procedures applicable to commercial applicants. Thus, prior to the establishment of spectrum auctions for commercial applicants, traditional comparative hearings were used to award licenses on commercial spectrum. All applicants in those hearings -- commercial and noncommercial -- were compared under the same comparative criteria.

Recently, the Commission adopted auction procedures for mutually exclusive commercial broadcast licenses. First Report and Order in MM Docket No. 97-234, 13 FCC Rcd. 15920 (1998) (“Competitive Bidding”). With respect to noncommercial educational spectrum, the Commission was not given auction authority. Instead, the Balanced Budget Act of 1997 (the “Act”)² specifically preserves the Commission’s authority to choose noncommercial educational licenses by lottery. The language of the Act requires auctions for commercial licenses but prohibits auctions to resolve mutually exclusive applications for “noncommercial educational broadcast” and “public broadcast stations” as defined by Section 397(6) of the Act. In the Competitive Bidding proceeding, the Commission postponed resolution of the question as to whether noncommercial educational applicants applying for commercial spectrum should be

² Balance Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997).

required to participate in spectrum auctions along with other commercial applicants. 13 FCC Rcd. at 15930.

It is clear that the statute, by its own language, does not intend for commercial spectrum to be awarded by any means other than auctions. The manner of awarding spectrum does not depend on the nature of the applicant, but, rather, on the nature of the spectrum. Section 309(j)(2)(C) of the Act provides that competitive bidding “shall not apply to licenses or construction permits issued by the Commission . . . for stations described in Section 397(6)” of the Communications Act. Section 397(6) expressly defines the term “noncommercial educational broadcast station.” Licenses and construction permits may be issued for such stations only in those circumstances where the Commission knows in advance that the ultimate licensee will be a noncommercial educational entity. Thus, auctions are prohibited only in those situations where a license will be issued for a reserved frequency or where noncommercial educational entities are the only applicants for a particular commercial (non-reserved) frequency.

Moreover, there are public interest reasons for requiring auctions to award commercial spectrum. The Commission is prepared to hold auctions in the very near future. Thus, service will be provided by winning bidders who construct their stations. On the other hand, the Commission is still considering what standards to adopt for comparing noncommercial educational applicants. Thus, allowing noncommercial applicants to hold the awarding of commercial spectrum hostage will only lead to non-service for the foreseeable future.

In addition, there would seem to be a element of fundamental fairness in requiring noncommercial educational entities who are applying for commercial spectrum to continue to abide by the rules applicable to such spectrum. Commercial entities, like Gartner, are forbidden to apply for noncommercial educational spectrum under any procedure. To permit

noncommercial educational entities to apply for commercial spectrum and, by so doing, to then mandate that all applicants (commercial and non-commercial) be compared under noncommercial criteria would unfairly prejudice commercial entities such as Gartner. On the other hand, there are no equities or public policies which would favor using noncommercial educational standards to award commercial spectrum.

Noncommercial educational applicants participating in auctions for commercial channels should be treated the same as commercial applicants. As such, they should be eligible for the same bidding credits as all applicants for commercial channels. However, there should be no special bidding credit or credits for noncommercial educational entities. As discussed above, such noncommercial educational entities have noncommercial educational spectrum which they and only they may apply for, and, thus, there is no basis for awarding them yet additional credit when seeking commercial spectrum.

Gartner supports making it easier for a noncommercial educational entity to request reallocation of commercially available channels to noncommercial channels available only to noncommercial educational applicants. Where noncommercial educational applicants for technical reasons have no choice but to operate on unreserved frequencies, it makes sense to allow them to seek the reallocation of spectrum from non-reserved to reserved through the rule making process. Gartner supports the Commission proposal that re-allotments be permitted where (1) the noncommercial educational entity would be precluded from serving its proposed community of license using the reserved band by existing reserved band stations and pending applications and (2) the proposed allotment would provide the first or second noncommercial educational service received in the community.

In the event that the Commission concludes that the Act statutorily precludes the

participation of noncommercial educational entities in auctions for commercial channels, Gartner believes that the Commission should hold noncommercial educational entities ineligible for non-reserved channels completely. Such a conclusion would be the simplest way to resolve such a conflict. By ruling noncommercial educational entities ineligible for non-reserve channels, the Commission could then award construction permits by auction (or immediate grant if only one commercial applicant remained), and service to the public could be provided on an expedited basis. When combined with the opportunity to reallocate commercial channels for noncommercial educational use discussed above, such a result makes sense. Commercial entities would be able to apply for commercial channels without facing delay created by competing noncommercial educational entities, and those same noncommercial educational entities could apply for their own noncommercial spectrum. Where noncommercial educational applications are presently pending, the Commission could permit such entities to initiate rule makings immediately, or, alternately, the Commission could, on its own, commence such reallocation rule makings so that such noncommercial applicants would not be unfairly prejudiced.

Gartner opposes the position of the Association of America's Public Television Stations that the Commission establish a separate processing track for noncommercial educational applications for commercial spectrum. According to that plan, once a technically acceptable application is filed for a commercial channel by a noncommercial applicant, the channel would be deemed reserved for noncommercial educational use, and only other noncommercial applicants would be permitted to file. The impact of such an approach on future commercial use is obvious. While commercial entities could not apply for noncommercial educational spectrum, noncommercial educational applicants would not only be allowed to apply for commercial spectrum, but, by so doing, would render that commercial spectrum noncommercial in nature.

There is no reason to remove commercial spectrum without any showing of public need.

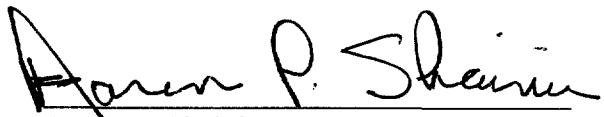
Moreover, it would be inconsistent with Congressional intent that commercial spectrum be awarded by auctions.

Gartner also opposes the Commission “hybrid” approach -- when both noncommercial educational and commercial entities compete for a commercial frequency, the Commission would first hold a lottery, with statutory diversification and minority preferences, to determine whether the noncommercial educational entity should receive the license or a commercial entity should “win” the opportunity to take part in an auction with the remaining commercial applicants eligible to participate. This multi-step process is convoluted in the extreme. It practically begs litigation and can be counted on resulting in the delay of valued broadcast service to communities that are presently in need. As the Commission itself noted, the “hybrid” method raises difficult minority and diversity preference issues. Moreover, a hybrid method would require the Commission to undertake the difficult task of devising a point system equally appropriate to commercial and noncommercial applicants. Given the ease by which Gartner’s recommendations may be implemented, there is no reasonable basis for adopting this convoluted “hybrid” method.

Gartner supports the position that whatever procedures are adopted by the Commission in this proceeding to be used as to future applicants should also be used to resolve present proceedings. Thus, in the event the Commission decides that noncommercial educational entities will no longer be eligible to apply for commercial spectrum, those pending applications filed by such noncommercial educational entities should be dismissed or, alternately, amended to new channels which have been re-allotted for noncommercial educational use.

Respectfully submitted,

JACK I. GARTNER

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